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6 UNITED STATES DISTRICT COURT  
7 SOUTHERN DISTRICT OF CALIFORNIA  
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10 ALI ALEJANDRO MENDOZA,  
an individual,

11 Plaintiff,

12 v.

13 UNITED STATES OF AMERICA;  
14 CITY OF NATIONAL CITY; THOMAS  
MALANDRIS; BENJAMIN PECK; and  
15 MICHAEL NUTTALL,

16 Defendants.  
17

Case No.: 15cv1528-JAH (BGS)

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS  
NATIONAL CITY AND BENJAMIN  
PECK'S MOTION TO AMEND  
SCHEDULING ORDER**

18 **INTRODUCTION**

19  
20 On March 31, 2017, this Court granted in part and denied in part Defendants City  
21 of National City and Benjamin Peck's ("Defendants") Motion for Summary Judgment  
22 and Partial Summary Judgment as to Plaintiff Ali Mendoza's ("Plaintiff") Second  
23 Amended Complaint. *Doc No. 116*. On January 5, 2018, Defendants filed a motion to  
24 amend or correct the scheduling order to allow the filing of a second summary judgment  
25 motion. *Doc. No. 141*. The motion has been fully briefed. *Doc. Nos. 150, 151*. After  
26 review of the parties' submissions, the Court deemed Defendants' motion to amend the  
27 scheduling order suitable for adjudication without oral argument. See CivLR 7.1 (d.1).  
28 After a careful review of the pleadings and for the reasons set forth below, Defendants'

1 motion to amend the scheduling order is **GRANTED IN PART** and **DENIED IN**  
2 **PART**.

### 3 DISCUSSION

4 Defendants' move to amend the scheduling order to file a successive motion for  
5 summary judgment on three grounds: (1) to reassert a qualified immunity defense as to  
6 Defendant Peck, (2) to challenge the City's liability under section 1983 in the absence  
7 of a *Monell* claim in the Third Amended Complaint, and (3) to challenge the viability  
8 of the Bane Act claims. Defendants' motion focuses primarily on the issue of qualified  
9 immunity, highlighting the importance of deciding qualified immunity "at the earliest  
10 possible stage in litigation" in order to preserve the essence of its purpose as "immunity  
11 from suit rather than a mere defense to liability." *Pearson v. Callahan*, 555 U.S. 223,  
12 231 (2009); *Morales v. Fry*, 873 F.3d 817, 822 (9th Cir. 2017).

13 Plaintiff argues that Defendants have not shown good cause to amend the  
14 scheduling order. He contends not only have Defendants already raised the issue of  
15 qualified immunity, but any failure on Defendants' part to raise it effectively is solely  
16 a result of their lack of diligence. Plaintiff further asserts that Defendants' motion to  
17 amend the scheduling order amounts to a belated motion for reconsideration of this  
18 Court's ruling on prior Motion for Summary Judgment and that Plaintiff would suffer  
19 prejudice as a result.

20 In response, Defendants' maintain that a successive motion would neither be  
21 frivolous nor repetitive. Defendants assert that the issue of whether the alleged conduct  
22 unreasonably violated a "clearly established" legal standard under the Fourth<sup>1</sup> or Fifth  
23 Amendment was not addressed or decided by this Court; nor has the Court determined  
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25 <sup>1</sup> The Fourth Amendment protects against unreasonable searches and seizures. However, whether the  
26 law, at the time, clearly established that it is unreasonable for an officer to rely on the apparent  
27 consent of a person under the same or similar circumstances as Plaintiff in the instant case has yet to  
28 be brought before the Court. "Thus, the relevant question is whether a reasonable officer could have  
believed [Mendoza's blood draw] to be lawful, in light of clearly established law and the information  
the [investigating] officer possessed. *Knox v. Sw. Airlines*, 124 F.3d 1103, 1108 (9th Cir. 1997)  
(citing *Kennedy v. Los Angeles Police Dep't*, 901 F.2d 702, 706 (9th Cir.1989).

1 how entitlement to qualified immunity would impact Plaintiff's Bane Act claims.  
2 Defendant also questions whether Mendoza can even assert a 42 U.S.C. §1983 claim  
3 based on an alleged Fifth Amendment violation because he was never subject to any  
4 criminal proceeding.

## 5 **1. ANALYSIS**

### 6 **A. Successive Summary Judgment Motion**

7 "[D]istrict courts have discretion to entertain successive motions for summary  
8 judgment." *Hoffman v. Tonnemacher*, 593 F.3d 908, 911 (9th Cir. 2010). Allowing a  
9 second summary judgment motion is a matter concerning case management, over which  
10 district court judges have broad discretion. *Avila v. Willits Env'tl. Remediation Tr.*, 633  
11 F.3d 828, 833 (9th Cir. 2011).

12 Defendants' posture their request in the form of a Rule 16(b) motion to amend  
13 the scheduling order to allow for a successive summary judgment motion. However, in  
14 many respects, Defendants' motion is akin in to an untimely motion to alter or amend  
15 the judgment pursuant to *Fed. R. Civ. P. Rule 59(e)*. While the Court recognizes it may  
16 tailor and adjust scheduling orders to the needs of the case as it progresses to permit  
17 successive motions for summary judgment it is not appropriate to reexamine issues  
18 already addressed or advance arguments that could have been raised prior to entry of  
19 the judgment. *Fed.R.Civ.P. Rule 59; J & J Sports Prods., Inc. v. Brummell, No.*  
20 *15CV2601-MMA (MDD)*, 2016 WL 4595140, at \*1 (S.D. Cal. Sept. 2, 2016) (citing  
21 *Exxon Shipping Co. v. Baker*, 544 U.S. 471, 486-87 (2008) (Rule 59 may not be used  
22 to relitigate old matters, raise new arguments, or present evidence that could have been  
23 raised prior to entry of the judgment.)

24 The arguments Defendants wish to assert in a successive summary judgment  
25 motion could have previously been raised, as Defendants do not assert a change in law  
26 or the discovery of new evidence. Nonetheless, the Court recognizes that the core  
27 principles underlying the doctrine would be diluted, depriving a defendant of a speedy  
28 and just resolution, if a defendant were forced to trial despite assertion of a viable

1 qualified immunity defense. *Mitchell v. Forsyth*, 472 U.S. 511, 526, (1985); *See also*  
2 *Gordon v. Veneman*, 61 F. App'x 296, 298 (7th Cir. 2003)(acknowledging three grounds  
3 for allowing a renewed or successive summary judgment motion: 1) when the  
4 controlling law has changed; 2) when new evidence has been discovered; and 3) when  
5 allowing such a motion would be necessary to correct a clear error or *prevent a manifest*  
6 *injustice.*) (Emphasis added.).

## 7 B. Qualified Immunity

8 The United States Supreme Court has discussed the purpose behind the creation  
9 of doctrine of qualified immunity.

10 Because qualified immunity is an immunity from suit rather than a mere defense  
11 to liability ... it is effectively lost if a case is erroneously permitted to go to trial.  
12 Indeed, we have made clear that the “driving force” behind creation of the  
13 qualified immunity doctrine was a desire to ensure that insubstantial claims  
14 against government officials [will] be resolved prior to discovery. Accordingly,  
15 we repeatedly have stressed the importance of resolving immunity questions at  
16 the earliest possible stage in litigation. (Citations and quotations omitted).  
17 *Pearson*, 555 U.S. at 231.

18 The issue of whether the alleged conduct by Officer Peck, in light of the  
19 undisputed facts, violated a “clearly established” legal standard under the Fourth or  
20 Fifth Amendment was not briefed by the parties nor addressed by this Court. Neither  
21 has the Court determined how entitlement to qualified immunity would impact  
22 Plaintiff’s Bane Act claims. The Supreme Court “clarified that while it ‘do[es] not  
23 require a case directly on point ... existing precedent must have placed the statutory or  
24 constitutional question beyond debate,’ such that ‘every’ reasonable official—not just  
25 ‘a’ reasonable official—would have understood that he was violating a clearly  
26 established right. *Morales v. Fry*, 873 F.3d 817, 823 (9th Cir. 2017) (quoting *Ashcroft*,  
27 563 U.S. at 741).

28 In light of *Pearson* and *Morales*, the Court finds it appropriate to permit  
Defendants to file a successive motion for summary judgment on the sole issue of  
qualified immunity.

Accordingly, **IT IS HEREBY ORDERED:**

1. Defendants' motion to amend the Scheduling Order is **GRANTED** and the pretrial motion deadline of June 13, 2016 is **VACATED** only as to the qualified immunity issue concerning Plaintiff's Fourth and Fifth Amendment and Bane Act claims;
2. Defendants' motion is **DENIED** in all other respects;
3. Defendants may file a second motion for summary judgment concerning Plaintiff's Fourth or Fifth Amendment and Bane Act claims no later than **May 11, 2018**;
4. Plaintiff's response to Defendants' motion for summary judgment shall be filed no later than **May 29, 2018**;
5. Defendant's reply brief, if any, shall be filed and served no later than **June 5, 2018**;
6. The motion hearing shall be held on **July 6, 2018, at 10:30 a.m.**, unless otherwise ordered by this Court.

**IT IS SO ORDERED.**

DATED: April 19, 2018



HON. JOHN A. HOUSTON  
UNITED STATES DISTRICT JUDGE